

LEGAL REVIEW NOTE

LC#: LC0006, To Legal Review Copy, as of
January 7, 2013

Short Title: Generally revising school laws creating
a special education savings account

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Date: January 10, 2013

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

Control of the State

LC0006, as drafted, may raise potential constitutional issues associated with Article V, section 11(5), of the Montana Constitution. Article V, section 11(5), provides: "No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not *under control of the state*." (Emphasis added.) LC0006, as drafted, authorizes a Montana special education savings account program and requires that public K-12 per-pupil funds be deposited into the account. Section 1(1), Section 2(3), and Section 8. LC0006, as drafted, authorizes a parent of a child enrolled in a Montana special education savings account program to personally expend money deposited in the account for purposes of purchasing education instruction from a nonpublic education provider or a public education provider or for payment toward college tuition, books, fees, or a college savings program. Section 2(1) and (3) and Section 4.

Consequently, a potential issue is whether the appropriation to the Office of Public Instruction for distribution to individuals (parents of children enrolled in the Montana special education savings account), and then ultimately to private entities for educational purposes, is in conflict with Article V, section 11(5).

Aid to Sectarian Schools

LC0006, as drafted, may also raise potential constitutional issues associated with Article X, section 6, of the Montana Constitution. Article X, section 6, provides:

Section 6. Aid prohibited to sectarian schools. (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

Under Section 2(1) of LC0006, "education provider" means a public school or a nonpublic school, an accredited virtual school, a tutor, or other individual or institution providing education to K-12 students, but not a home school. LC0006, as drafted, authorizes a parent of a child enrolled in a Montana special education savings account program to personally expend money deposited in the account for purposes of purchasing education instruction from a nonpublic education provider. Section 2(1) and (3) and Section 4. A potential issue is whether the definition of "education provider" includes sectarian schools and, if so, whether it conforms with the provisions of Article X, section 6.

Board of Regents

LC0006, as drafted, also imposes requirements on the commissioner of higher education to: manage individual Montana special education savings accounts; adopt rules and establish procedures to administer and manage Montana special education savings accounts; and develop a cooperative agreement with the superintendent of public instruction to assist in the implementation of the Montana special education savings account program. Section 9.

Article X, section 9 (2) (a), of the Montana Constitution provides:

(2) (a) The government and control of the Montana university system is vested in a board of regents of higher education *which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system* and shall supervise and coordinate other public educational institutions assigned by law. (Emphasis added.)

According to the Montana Supreme Court, this constitutional provision grants a high degree of independence and autonomy to the Board of Regents, subject only to the Legislature's power of appropriation. *Board of Regents v. Judge*, 168 Mont. 433 (1975). The Court in *Judge* further noted that "Inherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education." *Id.* at 454. In that case, the Court evaluated a number of statutory restrictions

imposed on the university system, including a provision that imposed a limit on salary increases for certain university officials. The Court held that this statute "specifically [denied] the Regents the power to function effectively by setting its own personnel policies and determining its own priorities" and held that limitation to be unconstitutional. *Id.*

Consequently, LC0006, as drafted, directly imposes legislative requirements outside of the legislative appropriation process on the commissioner of higher education that may raise potential constitutional conformity issues with Article X, section 9, of the Montana Constitution.

Requester Comments: None